action is obviously bad and 'almost incontestably bad' (per Fletcher Moulton LJ in *Dyson* v *A-G*[19] at p 419).

Thirdly, the power to strike out any pleading or any part of a pleading under O 18 r 19 is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea (see *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd (No 3)*[20]). So, for example, as a matter of discretion an action for a declaration that in the events which have happened a right of way has not been extinguished but is still exercisable will not be struck out as being an abuse of the process (see *Hampshire Country Council* v *Shonleigh Nominees Ltd*[21]).

In the present case, the main reliefs sought were by way of declaration and so I considered that quite apart from other considerations, I had a discretion as to whether or not to strike out the statement of claim, and having regard to the circumstances of the case as a whole, not forgetting the very serious allegations of conspiracy. I did exercise it by dismissing the two applications before me.

Fourthly, by the words 'frivolous and vexatious' are meant cases which are obviously frivolous or vexatious, or obviously unsustainable (per Lindley LJ in *A-G of Duchy of Lancaster* v *L & NW Rly*[18]). The pleading must be so clearly frivolous that to put it forward must be an abuse of the process of the court (per Jeane P in *Young* v *Holloway*[22] at p 90).

It must be self-evident from what I have thus far said, that on the face of the statement of claim, it is certainly arguable that the plaintiff has a reasonable cause of action against each of the defendants and that they have far from satisfied me that the statement of claim is frivolous or vexatious or that it is an abuse of the process of the court.

Lastly, I must consider the prayer for discharge of the interlocutory injunctions.

It was submitted by counsel for the fourth defendant, though not by counsel for the second, the third, and the fourth defendants, that the effect of the injunctions was to immobilize the fourth defendant and so, on the balance of convenience they should be discharged.

I was of the opinion that if the injunctions were discharged and the plaintiff were to succeed at the final hearing irreparable damage might be caused to the plaintiff and the acts of the fourth defendant as a trade union pending the hearing must surely be open to challenge. In all the circumstances, regard being had to the relevant circumstances, not forgetting the balance of convenience, the interests of all parties concerned and how best they might be protected, always keeping in mind the foreseeable positions at the final hearing, considerations of hardship in the meantime and other relevant discretionary factors, I was satisfied that there were sufficient grounds for continuing in force the injunctions, thus preserving the status quo until the plaintiff's claims are adjudicated upon by the court.

In the result, both the applications were dismissed with costs. On reflection, an early hearing ought to have been ordered and, to repair the omission, I do so now.

Applications dismissed.

Solicitors: *Mohideen & Asamaley; Nahappan, Dorairaj & Danker; Lim Cheng Poh, Lim & Rahim.*

Reported by *PS Ranjan*

Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C4797 OF 1985
VC GEORGE J
11 MAY 1990

Civil Procedure — Authority to act — Whether solicitors who caused writ to be issued on behalf of plaintiff had been properly authorized by the plaintiff — Whether lack of authority of the solicitors to act can be challenged at present stage of proceedings — Who was to bear burden of proof that suit had been instituted with proper authority

Companies and Corporations — Right to instruct solicitors — Whether the plaintiffs' articles of association empowered minority shareholder to instruct solicitors — Rights of a beneficial owner of shares registered in nominee names

Agency — Ratification — Whether act done by solicitors without proper authority can be ratified by the plaintiff

A writ was taken out by a firm of solicitors holding themselves out as solicitors of the first plaintiff. Judgment in default of defence was entered against the defendant and an attempt to have the default judgment set aside failed. The defendant subsequently took out a summons-in-chambers seeking various orders and, in particular, sought to have the writ set aside or struck off pursuant to O 18 r 19 and/or under the inherent jurisdiction of the court on the ground that at all relevant times the firm of solicitors had no proper authority to cause the writ to be issued on behalf of the first plaintiff.

It was discovered that the firm of solicitors was instructed to act by one Soo Seng Chuan who, it was discovered, beneficially owned all the shares in the first plaintiff but was entered in the books of the first plaintiff as a minority shareholder only. The rest of the shares in the first plaintiff were held by two other Malay shareholders as nominees of Soo Seng Chuan in order to misrepresent the first plaintiff as a Bumiputra company. Soo Seng Chuan in fact managed the entire affairs of the first plaintiff and even appointed a board consisting of Malay directors 'for ceremonial purposes'.

Held, striking off the first plaintiff's writ:

(1) The lack of authority of the solicitors to act can be challenged at any stage of the proceedings.

(2) The challenge having been made, the burden of proving that the suit had been instituted with proper authority vests on the first plaintiff.

(3) The articles of association of the first plaintiff provide that the business of the first plaintiff shall be managed by the directors and the directors may appoint a managing director. The powers of such managing director will be limited powers specifically conferred on him.

(4) In respect of Soo Seng Chuan, none of the articles of the first plaintiff's articles of association had been invoked to give him any of the powers he claimed to have or have reserved to himself as alleged beneficial owner of all the shares of the first plaintiff.

(5) The beneficiary of shares in a company registered in the name of another person as trustee has no rights in such company and any relations which the trustee has with the beneficiary are matters with which such company has nothing whatsoever to do.

(6) There has therefore been a failure to prove that Soo Seng Chuan had the authority to instruct the firm of solicitors to institute the suit. The effect is to make the proceedings a nullity in the sense that the action has not been properly instituted.

(7) The act of the firm of solicitors causing the writ to be issued without proper authority can be ratified by the first plaintiff. Ratification however must be effected within a reasonable time.

(8) The first plaintiff had failed the reasonable time test since what was held out to be ratification was the resolution of the board of directors and of the shareholders of the first plaintiff over a year and over two years respectively from the date of the challenge to the authority of the solicitors and well over three years and four years respectively from the date of the unauthorized issue of the writ. Worse, the status and shareholding of the individuals held out as directors and shareholders of the first plaintiff when the said resolutions were passed were the subject of a challenge in a Kuala Lumpur High Court civil suit.

(9) All orders made under or pursuant to the writ and pursuant to applications thereunder had to be and were set aside.

[*Editorial Note*: The first plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-205-90.]

Cases referred to

1 *Simmons* v *Liberal Opinion Ltd* [1911] 1 KB 966 (folld)
2 *Re LY Swee & Co Ltd* [1968] 2 MLJ 104 (folld)
3 *Chin Kok Kwong Const Sdn Bhd* v *Sunrise Towers Sdn Bhd* [1986] 2 MLJ 41 (folld)
4 *United Investment & Finance Ltd* v *Tee Chin Yong & Ors* [1967] 1 MLJ 31 (folld)
5 *Sundram Properties Sdn Bhd* v *Cyril Wettasinghe & Ors* [1987] 1 CLJ 213 (folld)
6 *Danish Mercantile Co Ltd* v *Beaumont* [1951] 1 Ch 680 (folld)

CK Yeoh for the plaintiffs.
S Kanawagi for the defendant.

Cur Adv Vult

VC George J: The writ herein was caused to be issued on 19 August 1985 at the instance of Messrs Chooi & Co, advocates and solicitors of Kuala Lumpur, holding themselves out as solicitors of the plaintiffs.

Judgment in default of defence was entered against the defendant. An attempt to have that default judgment set aside failed. However by an order of the court made on 6 January 1987, stay of execution of the judgment was given on terms to enable the issue of whether or not the judgment had thereafter been satisfied to be tried. The defendant was in that same order of 6 January 1987 given leave to apply to add Jamaludin bin Awalludin alias Muhyuddin as a co-plaintiff.

On 22 January 1987, the defendant took out the summons-in-chambers (encl (33)) in the court file seeking various orders and in particular by prayer 4 sought to have the writ set aside or struck off pursuant to O 18 r 19 and/or under the inherent jurisdiction of the court. In the meantime, on 21 January 1987, Jamaluddin was duly added as a plaintiff and is referred to hereafter as the second plaintiff.

The application was at the court's instance adjourned to and was heard in open court. It was supported by the affidavit (encl (32)) of Zaimah bte Mahiadin, a director of the defendant company, and by the affidavit of the second plaintiff (encl (31)).

Counsel for the defendant with the court's consent dealt with and submitted only on the said prayer 4 and restricted his submission in respect thereof to only one ground which was that at all relevant times Messrs Chooi & Co had no proper authority to cause the writ to issue on behalf of the first plaintiff.

In para 15 of the affidavit (encl (32)), Zaimah says:

> I am advised and verily believe that this action should not have been commenced against the defendant as in the first place, the plaintiff's solicitors did not have the authority to commence this action on behalf of the plaintiff, which is a corporate entity and without the authority of the board of directors.

The second plaintiff in his affidavit (encl (31)) says, inter alia, that he is the chairman and managing director of the first plaintiff and that he had not been aware of the institution of the suit until 14 February 1986 when at the office of Messrs Chooi & Co he learnt of this. He claims in paras 11 and 12 of his affidavit:

> 11 I also informed the plaintiff's solicitors that as they had commenced this action on the instructions of the minority shareholders/directors, then the plaintiff's solicitors should withdraw this action matter.
>
> 12 I wish to categorically state that at all material times either in the past or in the present, the minority shareholders had no authority to institute this legal action against the defendant and neither did any solicitors have any instruction to commence any action against the defendant.

The lack of authority of the solicitors to act can be challenged at any stage of the proceedings — see *Simmons*

v *Liberal Opinion Ltd*[1] followed in *Re L Y Swee & Co Ltd*[2] at p 107 and in *Chin Kok Kwong Const Sdn Bhd* v *Sunrise Towers Sdn Bhd*[3] at p 42. The challenge having been made the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company. See *United Investment & Finance Ltd* v *Tee Chin Yong & Ors*[4] at p 35.

Encik Yeoh Chong Keng, the partner in Messrs Chooi & Co, solicitors for the plaintiff who had the conduct of the matter by his affidavit (encl (83)) in the court file explained how Messrs Chooi & Co came to be instructed to cause the writ to issue. At para 4 of the affidavit he says:

> I wish to state that my firm was retained to act in this suit for the first plaintiff by Soo Seng Chuan. I was and still am counsel who was briefed. I still take instructions from Soo Seng Chuan in relation to the conduct of this case.

A former shareholder of the first plaintiff sets out in paras 2 and 3 of her affidavit (encl (82)) in the court file what she appeared to consider was the basis on which Soo Seng Chuan puported to authoritatively instruct solicitors on behalf of the plaintiff:

> 2 I was formerly a shareholder of the plaintiff. In this capacity I was the nominee of Soo Seng Chuan, who is my brother-in law. I know as a fact that all the shares held by the other shareholders in the plaintiff were subscribed by Soo Seng Chuan including those which were then held by the second plaintiff. Likewise all the appointments to the board were on the instructions of Soo Seng Chuan.
>
> 3 Soo Seng Chuan manages the business of the first plaintiff and the other directors are aware of this fact because he is the one that funds the operation of the business.

Soo Seng Chuan confirms the position by his affidavit (encl (84)) which makes interesting reading — paras 3 to 9 are reproduced here:

> 3 I am to state that I am the registered and beneficial owner of 65,000 shares out of 200,001 shares in the first plaintiff. The balance of the shares are registered in the names of:
>
> (a) Samsudin bin Mustapa — 122,501 shares
> (b) Basri bin Ab Talib — 12,500 shares
>
> However, both Samsudin bin Mustapa and Basri bin Ab Talib hold the said shares as my nominees and on trust for me. The share certificates in the first plaintiff are now produced and shown to me marked as exh 'SSC-8'.
>
> 4 Prior to the said shares being registered in the names of Samsudin bin Mustapa (Samsudin) and Basri bin Ab Talib (Basri), the said shares were held by the second plaintiff. The second plaintiff was divested of the said shares as follows:
>
> (a) 25 August 1986 — 25,000 shares were transferred to Samsudin (12,500) and Basri (12,500)
> (b) 27 January 1987 — 110,001 shares were transferred to Samsudin.
>
> I was able to effect the transfer of the said shares because the second plaintiff held the said shares as a nominee and trustee for me.
>
> 5 I incorporated the first plaintiff with the object of supplying food and ration to the various ministries in the government of Malaysia and for the sake of business and economic expediency I recruited amongst others, the second plaintiff as a shareholder and director in the first plaintiff.
>
> 6 From the outset, the second plaintiff agreed to be my nominee on the board of directors and as a shareholder in the first plaintiff in return for monetary compensation otherwise I would not have subscribed to the shares in his name nor caused his appointment as a director.
>
> 7 Even though I caused the appointment of the second plaintiff to the post of chairman cum managing director of the first plaintiff after the death of his father, it was largely ceremonial for the purpose of business efficiency and expediency bearing in mind the nature of the first plaintiff's business.
>
> 8 I was and still am the main driving force of the first plaintiff. I retained control and authority over the affairs of the first plaintiff and never at any time then or now divested myself of them. I managed the affairs of the first plaintiff although I had not been appointed as such because of my position as owner and/or beneficial owner of all the shares in the first plaintiff. All the directors including the second plaintiff were my nominees and they acted only on my instructions. In this context, I had full control of the first plaintiff.
>
> 9 Needless to say, it was also in this context that I retained Messrs Chooi & Co to act in this suit for the first plaintiff.

In plain words and without the use of euphemisms the incorporation of the first plaintiff company with the majority of the shares shown to be held by Malays was obviously to misrepresent to various government agencies that the first plaintiff is what is described as a Bumiputra company. There is evidence in the affidavits filed that many and substantial contracts with government agencies had been won by the company no doubt holding itself out as a Bumiputra company which suggests to me that the planned misrepresentations had in fact been perpetuated from time to time and may even have been fraudulent misrepresentations.

It seems to be that if there is any truth in what is alleged by Soo Seng Chuan in those paragraphs of his affidavit that I have just read the second plaintiff and Samsudin and Basri referred to were all participis criminis as it were in the misrepresentations. And the partners to this planned abuse of the Companies Act 1965 and of government policies having fallen out among themselves now seek the aid of the court to resolve their differences. I think that doing so is an abuse of the process. And if indeed the whole suit including the intended counterclaim are abuses of the process they and each of them, and all the petitions and pleas of each of the parties made thereunder should not be given any countenance by the court. They should not be entertained.

However at this stage I do not intend to pronounce on that aspect of the matter. The parties should be heard on

it and perhaps the court should be assisted by amicus curiae before any ruling is made on the right of the parties herein to have their problems adjudicated by a court of law. Perhaps the parties hereto should be required to show cause why the court should not strike out the claim and the counterclaim.

Now having camouflaged the whole operation by the incorporation of the plaintiff company with the substantial portion if not all of the issued shares which Soo Seng Chuan says he owns beneficially issued in the name of Malays and having appointed a board consisting of Malay directors to use the language used by Soo in his affidavit 'for ceremonial purposes only', Soo thinks he is entitled to manage the affairs of the first plaintiff. He says as much in para 8 of his affidavit which has been reproduced hereabove.

However the application of the law and practice pertaining to companies on the facts of this case suggest otherwise. The articles of association of the first plaintiff provide by art 73 that the business of the company shall be managed by the directors. Delegation of the powers of the directors may be made by power of attorney (see art 76) or to a committee duly appointed (see art 86). The directors may appoint a managing director. His powers as such managing director will be limited to the powers specifically conferred on him (see art 93). The position is identical to that referred to in *United Investment & Finance Ltd* v *Tee Chin Yong & Ors*[4] at p 35.

It seems obvious that in respect of Soo Seng Chuan none of the said articles or any other articles of association of the company had been invoked to give him any of the powers he claims to have or have reserved to himself as alleged beneficial owner of all the shares. The rights or lack of rights of a beneficial owner of shares registered in the name of somebody else was considered by Peh Swee Chin J in *Sundram Properties Sdn Bhd* v *Cyril Wettasinghe & Ors*[5] where at p 217 he reiterated:

> ... that a beneficiary of share in a company, registered in the name of another person as trustee, has no rights in such company and any relations which the trustee has with the beneficiary are matters with which such company has nothing whatsoever to do.

There has been a failure to prove that Soo Seng Chuan had the authority to instruct solicitors to institute the suit. The effect is to make the proceedings a nullity in the sense that the action has not been properly constituted. See *Danish Mercantile Co Ltd* v *Beaumont*[6] at p 687.

That same case is also authority for the proposition that the act of the solicitors causing the writ to issue without proper authority can be ratified by the plaintiff company. Ratification however must be effected within a reasonable time — see *Bowstead on Agency* (14th Ed), r 2(c) at p 51.

In the instant case, the challenge to the authority of the solicitors to cause the writ to issue in the name of the plaintiff was made by the summons (encl (33)) which is dated 22 January 1988. What is held out to be ratification is the resolution of the board of directors and of the shareholders of the company on 21 March 1988 and 21 September 1989 respectively, over a year and over two years respectively from the date of the challenge to the authority of the solicitors and well over three years and four years respectively from the date of the unauthorised issue of the writ. It seems to me that the company has failed the reasonable time test. Worse, the status and shareholding of the individuals held out as board directors and shareholders of the plaintiff company when the said resolutions were passed are the subject of a challenge in Kuala Lumpur High Court Civil Suit No 22-32-87, some of the cause papers of which have been exhibited in encl (80) herein.

In the face of that unresolved challenge, I fail to see how the court can accept that there has been due ratification. The writ has to be and is struck off. It follows that all orders made under or pursuant to the writ and pursuant to applications thereunder have to be and are set aside. I will hear arguments in respect of costs on a date to be fixed by the senior assistant registrar.

Order accordingly.

Solicitors: *Chooi & Co; Khana & Co.*

Reported by *Yap Shao Sin*